FILE COPY

No. 959. 25

Office Supreme Court,
FILED
MAY 10 193
CHARLES ELMORE CRO
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, as Successor Trustee to LIBERTY CENTRAL TRUST COMPANY, as Sole Residuary Legatee and Distributee of the American Estate of WILLIAM J. ORTHWEIN, Deceased, et al.

BRIEF IN OPPOSITION

TO PETITION OF GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DANIEL N. KIRBY,
Attorney for Respondents.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

SUBJECT INDEX.

	Page
Preliminary statement	1
The question presented	2
Statute and Regulations involved	2
Statement of the case	3
Summary of the argument	5
Points and authorities relied on	5
The argument	7
I. The "reasons for granting the writ," assigned in the petition, are without merit	7
(1) As to the first assigned reason, the decision of the Circuit Court of Appeals in the instant case is not in conflict with the decision in the **Schwarz** case	7
(a) The substantial dissimilarity in fact is clear	7
(b) In both cases the same distinction is noted and the same doctrine recognized	10
(2) The second assigned reason does not apply to the decision of the Circuit Court of Appeals in the instant case	11
Moreover, said decision was in accord with the Government's own interpretation of the meaning of Sec. 302 (c) of the Revenue Act of 1924, as shown by Art. 11 of Regulations 68	18
(3) The third assigned reason, to the extent not covered above, is irrelevant to the controlling question decided in the instant case	18
II. Conclusion	19

List of Cases Cited.

Commissioner v. Duke, 62 F. (2d) 1057.....6, 15
Commissioner v. McCormick, 43 F. (2d) 277.....6, 13
Commissioner v. Schwarz, 74 F. (2d) 714.....5, 7, 8, 10
Commissioner v. Wallace, 71 F. (2d) 1002; certiorari denied, 293 U. S. 600.....6, 15
Duke v. Commissioner, 23 B. T. A. 1104.....6, 15
Helvering v. Duke, 290 U. S. 591.....6, 14
Helvering, Commissioner, v. St. Louis Union Trust Co., 75 F. (2d) 416.....4, 5, 7, 10
Helvering v. Wallace, 293 U. S. 600..... 16
Klein v. U. S., 283 U. S. 231.....4, 6, 17
May v. Heiner, 281 U. S. 238.....5, 12, 14, 15, 16
McCormick v. Burnet, Commissioner, 283 U. S. 784.....5, 13, 14, 16
McCormick v. Commissioner, 13 B. T. A. 423.....6, 13, 15
Wallace v. Commissioner, 27 B. T. A. 902.....6, 15

Statutes Cited.

Revenue Act of 1924, Sec. 302 (c).....2, 18
Revenue Act of 1926..... 18

Regulations Cited.

Regulations 68, Article 11.....2, 6, 11
Regulations 70, Article 11..... 18

No. 879.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, as Successor Trustee to LIBERTY CENTRAL TRUST COMPANY, as Sole Residuary Legatee and Distributee of the American Estate of WILLIAM J. ORTHWEIN, Deceased, et al.

BRIEF IN OPPOSITION

TO PETITION OF GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PRELIMINARY STATEMENT.

This brief is respectfully submitted on behalf of the respondents in opposition to the pending "Petition for a Writ of Certiorari" filed for Guy T. Helvering, Commissioner of Internal Revenue, by the Solicitor General.

As stated in the petition, a writ is sought to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, 75 F. (2d) 416, entered in the above entitled cause January 17, 1935, affirming the decision of the United States Board of Tax Appeals (R. 26; 28 B. T. A. 107).

THE QUESTION PRESENTED.

The only question is whether the value of the decedent's interest—a mere possibility of a reverter—in the corpus of a trust estate created by his trust conveyance *inter vivos* should, although the possibility never became an actuality, be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death," under Section 302 (c) of the Revenue Act of 1924.

STATUTE AND REGULATIONS INVOLVED.

The applicable statute and regulations as quoted in the appendix to the petition (pp. 12, 13) are correct, but should be supplemented by the following portion of Article 11 of Regulations 68, which was in force at the death of decedent (italics ours):

> "The value of a *vested* remainder should be included in the gross estate. *Nothing should be included,* however, *on account of a contingent remainder* where *the contingency does not happen in the lifetime of decedent,* and the *interest consequently lapses at his death.*"

STATEMENT OF THE CASE.

The facts stated in the petition (pp. 2-5) are substantially correct, but should be supplemented by the following:

The case was tried before the Board of Tax Appeals and submitted on a "Stipulation of Facts" filed with the Board (Rec. 27, 39, 46).

This stipulation includes (as "Exhibit B" thereto) a copy of the Trust Indenture made by decedent, William J. Orthwein, dated January 1, 1920 (Rec. 48-55).

This indenture, in addition to the provisions stated in the petition, contained the following express declaration of the grantor's intent in making it:

> "The grantor * * * desires by this Indenture to make for the benefit of his daughter * * * as the life beneficiary of the trust hereby created, an absolute and irrevocable gift and settlement of the property hereinafter described, so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein, etc. * * *" (Rec. 48).

The grantor retained unto himself no power of revocation or alteration. The only power to end the trust during the life of the grantor vested in the trustee alone (Rec. 52). The only person to whom power was given to advise or direct the trustee in respect of "the purchase, sale or exchange of assets" of the trust estate was the grantor's daughter (Rec. 51).

The daughter of grantor was born on February 1, 1891. When the indenture was made the grantor was sojourning in Switzerland (Rec. 47). When he died he was a resident of Switzerland, domiciled there (Rec. 39).

The trust was in existence when the grantor died, and the trust is still alive (Rec. 44).

Neither of the contingencies upon the happening of either of which the trust would have reverted to the grantor ever happened; i. e., (1) the trust was not terminated by the trustee during the grantor's life, (2) nor did his daughter predecease the grantor pending the trust.

The contention for petitioner below, as stated by the Circuit Court of Appeals (*Helvering, Commissioner, v. St. Louis Union Trust Co.*, 75 F. [2d] 416, at 417-418), was:

> "That the decedent, in creating the trust, had reserved to himself a substantial interest in the trust property in the nature of a vested remainder, and that, since his death had the effect of making available to others this interest which might have reverted to him during his lifetime, the value thereof was properly taxable as a part of his estate, in view of Klein v. United States, 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996."

In deciding against this contention the Circuit Court of Appeals held (75 F. [2d], at 418): That decedent, by the trust instrument, had "parted with the legal title to the trust property, and to all beneficial interest therein during the life of the trust, and did so irrevocably"; that his death "merely changed the possibility that the property would revert to him into an impossibility," and that therefore grantor's death was not the generating source of the title that passed to others by the indenture, but it merely destroyed the possibility that the property might revert to him.

SUMMARY OF THE ARGUMENT; POINTS AND AUTHORITIES RELIED ON.

I.

The "reasons for granting the writ," assigned in the petition, are without merit.

(1) The decision of the Circuit Court of Appeals in the instant case is not in conflict with the *Schwarz* case, as contended in the petition.

Helvering, Commissioner, v. St. Louis Union Trust Co., 75 F. (2d) 416 (C. C. A. 8);
Commissioner v. Schwarz, 74 F. (2d) 714 (C. C. A. 2).

(a) Because the facts are substantially different and the cases clearly distinguishable.

Commissioner v. Schwarz, 74 F. (2d) 712, at 713-714;
Helvering, Com'r, v. St. Louis Union Trust Co., 75 F. (2d) 416, at 418.

(b) Because in both cases the courts make the same distinction and thereby avoid conflict in doctrine.

Commissioner v. Schwarz, 74 F. (2d) 712, at 713-714;
Helvering, Com'r, v. St. Louis Union Trust Co., 75 F. (2d) 416, at 418.

(2) The existing situation in respect of the doctrine applicable to the instant case is not in need of clarification, as contended in the petition.

May v. Heiner, 281 U. S. 238, at 243;
McCormick v. Burnet, Com'r, 283 U. S. 784;

McCormick v. Commissioner, 13 B. T. A. 423, at 437;
Commissioner v. McCormick, 43 F. (2d) 277, at 279;
Helvering v. Duke, 290 U. S. 591;
Commissioner v. Duke, 62 F. (2d) 1057, at 1058;
Duke v. Commissioner, 23 B. T. A. 1104, at 1113-1114;
Commissioner v. Wallace, 71 F. (2d) 1002, certiorari denied, 293 U. S. 600;
Wallace v. Commissioner, 27 B. T. A. 902, at 913;
Klein v. U. S., 283 U. S. 231, 234.

The decision in the instant case is in accord with Article 11 of Regulations 68, applicable to the Revenue Act of 1924.

(3) (a) The first reason (a conflict of decisions) suggested in point 3 of the petition has been answered above.

(b) The second reason suggested in point 3, relating to the differing interests whose value is sought to be taxed in the *Wallace* case and in the instant case, respectively, is irrelevant to the controlling questions decided in the two cases.

H.

Conclusion.

THE ARGUMENT.

I.

It is respectfully submitted that the "reasons for granting the writ," assigned in the petition, are without merit.

(1) As to the first assigned reason, the decision of the Circuit Court of Appeals in the instant case, *Helvering, Commissioner, v. St. Louis Union Trust Co.*, 75 F. (2d) 416 (C. C. A. 8), is not in conflict with the decision in *Commissioner v. Schwarz*, 74 F. (2d) 714 (C. C. A. 2), (a) because the facts are substantially different, and (b) because the opinion in each case makes clear the distinction in fact between the two classes of cases and shows that, in respect of the legal doctrines applicable, the two courts are in harmony, not in conflict.

(a) The substantial dissimilarity in fact is clear. In the *Schwarz* case the settlor had conveyed property in trust to pay out of the net annual income a stated annuity to his sister Anna, during her life, and to pay the balance of the net annual income to himself, if living, and if not living, then over to others. In respect of the corpus, the instrument provided that, at the death of his sister Anna,

> "The trustee shall pay, transfer and deliver the principal of the said trust fund * * * to the donor, if then living, and if not then living, in equal shares, per stirpes, to his descendants then living, and if neither he nor any descendants of his be then living, in equal shares to such of his brothers and sisters as shall be then living,"

and he named his brothers and sisters.

The settlor reserved the right to transfer additional

property to the trust at any time, also the right to withdraw any of the trust property before April 1, 1927, and to receive the property so withdrawn as his absolute property, free and discharged from the trust. He also reserved the right to amend the trust at any time before April 1, 1927, and the right to revoke and terminate the trust before that date, provided such amendments of revocation and termination be made in writing, signed by the donor or his nominees duly authorized.

The settlor died January 1, 1931, without having revoked or amended the trust. His sister Anna survived him. His executors, in filing their estate tax return, failed to include as a part of decedent's estate the value of decedent's interest in the property held in trust. The Commissioner determined a deficiency in federal estate tax resulting from including in the gross estate the value of decedent's remainder interest in the property thus held in trust.

It will be noted from these facts: That the settlor reserved to himself not only the beneficial ownership (subject to the specific annuity to his sister Anna for her life), but also the remainder in the corpus after her life estate; and that in the event of his death during his sister's life estate, then by his death said remainder would pass to his descendants, etc.

Therefore, it necessarily followed that his death was the event intended by the instrument which effected a transmission of this reserved remainder from the settlor to his living descendants.

That the Circuit Court of Appeals so held appears clearly from the following portions of its opinion (*Commissioner v. Schwarz*, 74 F. [2d] 712, at 713-714):

> "Here the decedent transferred property in trust, a fixed amount of the income from which was to be paid

annually to his sister during her life. Up to April 1, 1927, the trust could have been revoked, but was not revoked nor amended by him at any time before his death. By the terms of the trust instrument he reserved to himself a remainder over after termination of the life estate, and if his death occurred prior to the termination of the life estate, the decedent's remainder interest went to his descendants. Since he died prior to the termination of the life estate, it was proper to include in his gross estate, subject to the federal estate tax, the value of the remainder interest which passed at his death to his descendants. Klein v. United States, 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996; Com'r v. City Bank Farmers' Trust Co. (C. C. A. 2), 74 F. (2d) 242, decided Dec. 17, 1934; Union Trust Co. v. United States (Ct. Cl.), 54 F. (2d) 152; Sargent v. White, 50 F. (2d) 410 (C. C. A. 1).

"The death of this grantor was the indispensable and intended event which effected a transmission of a remainder interest from the dead to the living (Klein v. United States, supra), and the grant of the remainder interest in the trust fund was necessarily 'intended to take effect in possession or enjoyment at or after' decedent's death within the meaning of the statute, Section 302 (c), 26 U. S. C. A., § 1094 (c). Thus the value of the remainder interest in the trust fund should be included in the gross estate. The life estate should be valued and deducted from the full amount of the trust corpus and the remainder taxed. Lit v. Commissioner (C. C. A.), 72 F. (2d) 551."

In the instant case the grantor did not reserve a remainder interest. He kept merely a possibility of a reverter. When he died, his daughter surviving, he had no interest whatever which passed to others as the result of his death. He had theretofore by his trust indenture parted irrevocably with all interest in the trust estate during her life.

That this fundamental distinction in the facts constituted the reason for the decision of the Circuit Court of Appeals in the instant case appears from the following excerpt from the opinion (*Helvering, Commissioner, v. St. Louis Union Trust Co.*, 75 F. [2d] 416, at 418):

> "The distinction between the Klein case and this case, as we see it, is that in the former the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor parted with the title and all beneficial interest in the property and retained no right with respect thereto that would pass to anyone as the result of his death. In the Klein case death was the generating source of title, while in this case the trust instrument was the source of title, and death merely destroyed a possibility that the trust property might revert to the grantor."

(b) Moreover, in both the instant case and the *Schwarz* case the opinions of the Circuit Courts of Appeals stress the same distinction above noted and thereby clearly avoid all conflict in doctrine as between said courts.

This appears from a comparison of the above excerpts from the opinion in the instant case with the following from the opinion in the *Schwarz* case (74 F. [2d] 712, at 713; italics ours):

> "This case is to be distinguished from the class of cases where property is transferred in trust • • • *where no remainder is reserved in the grantor.* In such cases *the death of the grantor is not the event which effects the transfer of the remainder interest in the property held in trust.*"

And, at page 714:

> "Cases such as Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397;

May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244; McCormick v. Burnet, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, and Commissioner v. Wallace (C. C. A.), 71 F. (2d) 1002, *are distinguishable*. There the remainders were in form or substance vested to persons other than the grantors and not, as here, contingent on the time of his death. In Helvering v. Duke, 290 U. S. 591, 54 S. Ct. 95, 78 L. Ed. 521, the trust instrument provided for the creation of a trust for the benefit of the grantor's daughter, her children and their descendants during her life, and for a further period of twenty-one years, at which time the corpus was to be distributed to the children and their descendants. In the event that the beneficiary died prior to the death of the grantor, or in the event that she died subsequent to his death and left no children or descendants of children surviving, the corpus would revert to the grantor or her estate. It was held that *this mere possibility of reverter did not have the effect of reserving* to the grantor any rights or benefits which passed at or after his death. In the instant case the trust was created for the purpose of providing a fixed annual income to a beneficiary for life. The grantor clearly *parted with no larger interest* in the trust corpus. *His death effected the transmission* of his remainder interest to his heirs. Under authoritative decisions, that remainder constituted a part of his taxable gross estate."

(2) The second suggested reason for granting the writ, viz., that "the existing situation is in need of clarification," is not pertinent to the decision in the instant case.

The petition rests the contention (p. 7) chiefly upon the decisions in the instant case and in the *Schwarz* case.

That these two decisions do not support the contention appears from their respective facts and doctrines as shown above.

Nor do the other cited decisions support the suggestion that the instant case should be used to clarify the question of law herein decided. The doctrine applicable to the instant case, and in accord with which it was decided by the Circuit Court of Appeals for the Eighth Circuit, has already been clarified by this Court.

In *May v. Heiner*, 281 U. S. 238, the decedent, Pauline May, had on October 1, 1917, by trust conveyance, transferred securities in trust, to pay the net income to her husband during his life, and, after his death, to her during her life, and after her death the estate was to be distributed equally among her children. It does not appear from the opinion whether her husband survived her, but this fact was held to be of no importance.

The Government contended (281 U. S., at 243) that, *because of her reserved life estate,* if she survived her husband, the transfer of the principal could not take effect *until her death,* and that therefore the estate was taxable. The Court held that the conveyance was not one to take effect in possession or enjoyment at or after her death, saying (281 U. S., p. 243) (italics ours):

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those w rds. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May *no interest* in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The *interest therein which she possessed immediately prior to her death was obliterated by that event.*"

The rule thus established has been followed by the Circuit Courts of Appeals, including the Court which decided the instant case.

In *McCormick v. Burnet, Commissioner*, 283 U. S. 784, the Court adhered to the rule established in *May v. Heiner*. The grantor, Nettie McCormick, had by trust conveyance transferred securities in trust, with a provision that should she survive the other named beneficiaries, or in case of an earlier termination of the trust, the trust estate should revert to her if then living.

(The analogy to the facts in the instant case is close.)

The case originated before the Board of Tax Appeals as *Cyrus H. McCormick et al. v. Commissioner*, 13 B. T. A. 423, where the principal question decided was whether the trust estate thus settled by the decedent was "intended to take effect in possession and enjoyment at or after death."

One of the arguments for the Commissioner in support of his contention that the trust estate was subject to the estate tax was based on:

> "The provision that should the decedent survive the beneficiary, the trust would terminate, and she would take the trust property" (13 B. T. A., at 437, referring to Article Third of the McCormick trust settlement as set out in 13 B. T. A., at pages 427-428).

The Board of Tax Appeals decided against this contention, saying (13 B. T. A., at 438):

> "We are confirmed in this conclusion when we consider that Mrs. McCormick completely divested herself of legal title and beneficial ownership five years prior to her death, *subject only to certain contingencies which, in fact, never operated.*"

On appeal from this decision the Circuit Court of Appeals for the Seventh Circuit (*Commissioner v. McCormick*, 43 F. [2d] 277, at 279) held that said provision in

the trust conveyance did tend to show an intent to create a trust to take effect in possession or enjoyment at or after the death of the grantor.

On writ of certiorari this Court, in a per curiam opinion (*McCormick v. Burnet, Com'r*, 283 U. S. 784), reversed the judgment of the Circuit Court of Appeals, saying (p. 784) (italics ours):

> "The question in this case is that of the construction of Section 402 (c) of the Revenue Act of 1921, Chap. 136, 42 Stat. at L. 227, 278, a provision similar to that of Section 402 (c) of the Revenue Act of 1918, Chap. 18, 40 Stat. at L. 1057, 1097, which has already been construed by this Court; and, in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the United States Circuit Court of Appeals for the Seventh Circuit is reversed *upon the authority of May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, 67 A. L. R. 1244, 50 S. Ct. 286."

While it is true, as stated in the petition herein (p. 8), that the affirmance in *Helvering v. Duke*, 290 U. S. 591, having been by an equally divided court, may not be regarded as an authoritative decision by this Court, the case should be noted as showing that another Circuit Court of Appeals (of the Third Circuit) held in harmony with the above decisions of this Court in *May v. Heiner* and *McCormick v. Burnet, Com'r*, on facts in close analogy to those in the instant case.

In *Helvering v. Duke* the settlor, Duke, had made an absolute settlement of securities in trust for the benefit of his daughter and her descendants, with a provision that if she died during his lifetime the trust estate should revert to him in absolute title.

The daughter survived the settlor, so the contingency, upon the happening of which rested the possibility of a reversion, did not occur.

The case originated in *Duke v. Commissioner*, 23 B. T. A. 1104, and was there decided on the authority of the decisions in *McCormick v. Commissioner*, 283 U. S. 784, and of *May v. Heiner*, 281 U. S. 238, against the taxability of the mere possibility of a reverter which never became an actuality. This decision of the Board of Tax Appeals was affirmed in *Commissioner v. Duke*, 62 F. (2d) 1057, at 1058 (C. C. A. 3), upon a memorandum opinion which merely approved the opinion of the Board.

The decision in *Commissioner v. Wallace*, 71 F. (2d) 1002 (C. C. A. 2), clearly affords no support for the contention that confusion exists among the Circuit Courts of Appeals on the point involved and decided in the instant case.

In the *Wallace* case the settlor had transferred securities in trust, reserving the right to receive the net income during her own life. At her death the trust estate was to be distributed to the daughter of settlor if the daughter then survived. If the daughter should die first, the estate was to revert to the settlor. The daughter did not die first.

The Board of Tax Appeals held (*Wallace v. Commissioner*, 27 B. T. A. 902, at 913), that the death of settlor was not the generating source of any accession to the property rights of the surviving daughter; therefore, the "mere possibility of reversion" (27 B. T. A., at 910), which never became an actuality, did not afford the basis of a tax.

The Circuit Court of Appeals for the Second Circuit summarily dismissed the appeal of the Commissioner (on

June 4, 1934) with the following per curiam opinion (71 F. [2d] 1002):

> "Affirmed on the authority of *McCormick v. Burnet, Commissioner*, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, and *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244."

And on October 15, 1934, this Court denied the Commissioner a writ of certiorari (*Helvering v. Wallace*, 293 U. S. 600).

It is true, as stated in the petition herein (p. 9), that in the *Wallace* case the Board of Tax Appeals held that, under the pertinent law of New York State, the daughters, by the trust instrument, took a vested remainder, and in that respect the facts differ from those in the instant case, but the fact remains that both the Board of Tax Appeals and the Circuit Court of Appeals considered and decided the point that the settlor's mere possibility of a reverter, which did not occur, afforded no basis for a tax.

It is not correct to say (Petition, p. 9) that in the instant case a remainder was given in the first instance to the grantor. On the contrary, a complete and irrevocable title was given in the first instance to the daughter during her life, subject only to the bare possibility of a reverter in case she predeceased the grantor pending the trust.

From the cases above reviewed it appears that the Circuit Courts of Appeals of the Second, Third and Eighth Circuits have followed the rule in *May v. Heiner* (supra), and that while the Court in the Seventh Circuit, in the McCormick case (43 F. [2d] 277), did not follow it, the decision *contra* was reversed (*McCormick v. Burnet, Com'r*, 283 U. S. 784).

It is respectfully submitted that the cases above reviewed show that the decision sought to be reviewed in

the instant case is in accord with the established doctrine of this Court, and that no confusion in doctrine now exists upon the point decided sufficient to invite a reconsideration here of the same point which the Court refused to review in the *Wallace* case.

The case of *Klein v. U. S.*, 283 U. S. 231, cited in support of the petition herein (p. 7), is clearly to be distinguished from the instant case and is, therefore, not in point here.

In the *Klein* case the first habendum clause of Klein's deed conveyed to his wife a life estate which vested immediately (283 U. S., at 232). The second clause dealt with the reversion in fee, which the grantor expressly *retained*, and, as the Court said (283 U. S., at 233-234; italics ours):

> "Whether that *ever did become vested in the grantee depended upon the condition precedent* that *the death of the grantor happened before that of the grantee.*"

Accordingly it was held that *the death of the grantor* was "the indispensable and intended event which brought the larger estate *into being* for the grantee *and effected its transmission* from the dead to the living."

In the instant case the situation is substantially different. Here the grantor did not retain a remainder, but parted with it, retaining only a contingent possibility of reverter. Here it is not the death of the grantor, but the death of his daughter, or the earlier termination of the trust, which determines the vesting of the reversion sought to be taxed. Neither of these contingencies, upon the happening of either of which the reversion would take effect, *had any relation to the death of the grantor*. And neither happened. The trust still exists, and his daughter survived the grantor.

Consequently his death did not effect the transmission of any interest in the property "from the dead to the living." It merely destroyed the possibility that when either contingency should happen the estate would revert to the grantor.

It may be of interest to note here that when decedent (Orthwein) died, the Government interpreted Section 302 (c) of the Revenue Act of 1924 (involved in the instant case), as meaning that *contingent* interests, even when they were remainders, were not required by the act to be included in the gross estate for the purpose of the estate tax.

This appears from Article 11 of Regulations 68 (quoted above), to the effect that contingent remainders should not be included "where the contingency does not happen in the lifetime of decedent, and the interest consequently lapses at his death."

Under the Revenue Act of 1926, Article 11 of Regulations 70, was to the same effect.

To the extent that "Regulations" are to be considered part of the law, the decision in the instant case was in accord with the act as so construed by the Government.

(3) The third reason suggested in the petition for a writ (p. 11) is dual in substance:

(a) That there is *now* a conflict of decisions in the Circuit Courts of Appeals.

This has been answered above.

(b) That in the *Wallace* case the Government sought to impose the tax upon the whole value of the trust property, whereas the tax involved in the instant case is sought to be imposed only upon the value of the remainder.

It is respectfully submitted that this distinction is wholly

irrelevant to the controlling question considered and decided in the two cases.

II.

Conclusion.

In conclusion, it is respectfully submitted that the reasons advanced in the petition herein lack the merit required by Rule 38 and that, therefore, the petition should be denied.

Respectfully submitted,

DANIEL N. KIRBY,
Attorney for Respondents.

May, 1935.